UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

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Federal Communications Commission
Office of Secretary

July 17, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Ex Parte* Letter to Chairman Kennard in CC Docket Numbers 98-91, 98-32, 98-26, 98-11, Section 706 of the Telecommunications Act of 1996

Dear Ms. Salas:

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47. C.F.R. § 1.1206(b)(1), enclosed you will find eight copies of the *ex parte* letter from Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce, to Chairman William E. Kennard in the above-referenced proceeding. The original was hand-delivered to Chairman Kennard and copies have been hand-delivered to each of the Commissioners and to Kathryn C. Brown, Chief of the Common Carrier Bureau.

Please direct any questions you may have regarding this filing to the undersigned. Thank you for your cooperation.

Respectfully submitted,

Kathy D. Smith
Acting Chief Counsel

Enclosures

cc: Chairman William E. Kennard
Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Kathryn C. Brown, Common Carrier Bureau Chief

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UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications and Information
Washington, D.C. 20230

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Re: Section 706 of the Telecommunications Act of 1996

Dear Chairman Kennard,

The Commission will soon initiate an inquiry, mandated by section 706 of the Telecommunications Act of 1996 (1996 Act), into the deployment of advanced telecommunications capabilities. As part of this inquiry, the Commission will determine whether advanced capabilities are "being deployed to all Americans in a reasonable and timely fashion," or whether the agency must "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[1/]

As the Commission embarks upon its inquiry, NTIA, on behalf of the Administration, wishes to offer some guiding principles, as well as a framework for spurring investment in high-speed, switched, broadband networks. Deployment of the broadband networks of the future is critical for our nation's economic prosperity and advancement of Americans' standard of living. Our information economy increasingly demands such networks, which in turn create jobs and demand for networking equipment, appliances, and software. These networks are enabling distance learning, telemedicine and home health care, e-commerce, and community networking. Moreover, an advanced telecommunications and information infrastructure allows the United States to maintain important strategic advantages in the global information economy.

The upcoming inquiry is an opportunity for the Commission to encourage investment in broadband networks and services by all industry segments, using a variety of technologies. We hope that your inquiry will be looking to remove barriers to investment by wired and wireless providers, incumbents and

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1/ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(b), 110 Stat. 153 (codified at 47 U.S.C. S 157 note) (1996 Act).

competitors. Now is the time to eliminate regulations that are not necessary to promote competition or to protect consumers.

Our view of Section 706 reconciles two fundamental Administration goals with respect to telecommunications: (1) promoting competition in local, national, and international telecommunications markets; and (2) giving Americans access as soon as possible to the broadband networks of the future. The Administration has long believed that "[o]ne of the most effective ways to promote investments in our nation's information infrastructure is to introduce or further expand competition in communications and information markets."[2/] Competition will lead to lower prices, greater consumer choice, and faster deployment of advanced telecom networks and services. We already observe that incumbents are investing more in those areas where they face competition.

The 1996 Act reflects that same procompetitive philosophy. Although Congress therein established the goal of accelerating deployment of advanced services, it chose to achieve that objective "by opening all telecommunications markets to competition."[3/] Even the deregulatory provisions of the 1996 Act explicitly link regulatory relief to the presence of competition in the markets implicated.[4/]

The emphasis on competition permeates section 706 as well. It is no accident that the statute specifies as one appropriate Commission response to stalled deployment of advanced capabilities "measures that promote competition in the local telecommunications market."[5/] In fact, the legislative history of section

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2/ U.S. Dep't of Commerce, Information Infrastructure Task Force, The National Information Infrastructure: Agenda for Action 7 (Sept. 1993).

3/ H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124.

4/ See 47 U.S.C. § 160(b) (in determining whether regulatory forbearance would serve the public interest "the Commission shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services"); id. § 161(a)(2) (Commission shall conduct biennial reviews of its regulations to "determine whether any such regulation[s] [are] no longer necessary in the public interest as a result of meaningful economic competition between providers of" telecommunications services).

5/ 1996 Act, § 706(a).

706 suggests that it would operate only in the event that competition failed to produce reasonable and timely broadband deployment.[6/]

We also believe that section 706 underscores our nation's universal service goals. Section 706 encourages deployment of advanced telecom capabilities to *all* Americans.[7/] As the Commission undertakes its inquiry, it should also look to Section 254 of the 1996 Act, with its complementary emphasis on encouraging deployment of advanced services to all Americans, including consumers in rural areas.[8/] We urge the Commission to consider universal service support mechanisms that do not deter companies from investing in broadband networks and services.

NTIA recognizes that other policies and forums will affect broadband deployment. For example, the emergence of the Next Generation Internet and local rights-of-way policies will influence the buildout of advanced networks. We are interested in encouraging a dialogue on a broader set of issues, as well.

Finally, we believe that the States are key players on these issues. Many States are developing creative solutions to emerging obstacles to broadband investment and deployment. Moreover, the states are responsible for many facets of the implementation of broadband policies.

Several of the Bell Operating Companies (BOCs) have anticipated the Commission's inquiry by invoking section 706 in support of petitions for relief from

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6/ Section 706 is taken from section 304 of S. 652, the telecommunications reform bill adopted by the Senate in June 1995. The principal author of that bill, Senator Pressler, explained the provision in the following fashion: "Incentives for deployment of advanced telecommunications will be employed in areas where competition does not occur." Chairman Pressler's Telecommunications Competition and Deregulation Act of 1995: "Discussion Draft" Summary, at 3 (Feb. 1, 1995). See also 142 Cong. Rec. S700 (daily ed. Feb. 1, 1996) (Statement of Sen. Burns) ("If competition is stalled, the [bill] gives the FCC authority to quicken the pace of competition and deregulation to accelerate the deployment of advanced telecommunications infrastructure.").

7/ 1996 Act, § 706(b).

8/ 47 U.S.C. § 254(b)(3). See also Ex Parte Presentation of the Rural Utilities Service, CC Docket 96-45 (filed January 30. 1998) (available at <http://www.usda.gov/rus/unisrv/univsrv.htm). Under no circumstances should the Commission take any action pursuant to section 706 that would reduce or that could be used to avoid a firm's universal service obligations under section 254.

various Commission regulations and certain provisions of the 1996 Act.[9/] Although the specific relief sought is at times difficult to ascertain, it appears to be threefold in nature:

- Permission for the BOCs to offer digital subscriber line (DSL) services free from tariff regulation, price-cap regulation, and separation requirements.[10/]

- Relief from section 251(c) of the 1996 Act so that the BOCs may offer DSL services free from unbundling and resale requirements, save for the obligation to make available to competitors the subscriber loops on which those services are based.

- Relief from section 271 of the 1996 Act, ostensibly so that the companies may construct and operate regional and national data networks, without regard to LATA boundaries.

As explained more fully below, NTIA has concluded that the Commission should not grant the BOCs' 706 petitions at this time because the BOCs have not sufficiently opened their markets to competition. We do, however, propose a process by which the BOCs and other incumbent local exchange carriers (ILECs) may secure regulatory relief in the future. More generally, we suggest ways in which the Commission can stimulate development of advanced broadband networks and services by promoting a robust DSL marketplace, one which will bring all Americans new advanced telecom services.

9/ Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Relief from Regulation, CC Docket No. 98-91 (filed June 9, 1998) (SBC Petition); Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Capabilities, CC Docket No. 98-32 (filed Mar. 5, 1998) (Ameritech Petition); Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26 (filed Feb. 25, 1998) (US West Petition); Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11 (filed Jan. 26, 1998) (Bell Atlantic Petition).

10/ DSL technology enables the copper loops that carry voice traffic from a local exchange carrier (LEC) switching office to a customer's premises to transmit data traffic at relatively high speeds. Electronics placed at both ends of the loop create at least three transmission paths: a standard voice-grade channel, a "downstream" data path from the office to the premises, and an "upstream" data channel in the opposite direction. See SBC Petition, supra note 9, at 7.

Lack of Commission Forbearance Authority Under Section 706

The BOCs contend that section 706 gives the Commission broad discretion to forbear from applying any provision of the Communications Act to a carrier's services, if the Commission deems such action necessary to assure timely deployment of advanced broadband services to all Americans.[11/] They claim further that the Commission's forbearance authority under section 706 is independent of -- and, indeed, more extensive than -- that granted in section 10 of the Act because the latter provision bars the Commission from nullifying sections 251(c) and section 271 of the Act, whereas section 706 is not so limited.[12/]

That argument is without merit. It must be recalled, first, that prior to enactment of the 1996 Act, courts had sharply restricted the Commission's authority to forbear from applying the tariffing requirements of the Communications Act to carriers that, in the Commission's estimation, lack market power.[13/] Although the courts were sympathetic to the Commission's desire to eliminate regulation for carriers without the power to impede competition or to harm consumers, they nevertheless concluded that "we are not at liberty to release the agency from the tie that binds it to the text Congress enacted."[14/] That, in the courts' view, would require specific direction from Congress.[15/]

11/ Bell Atlantic Petition, supra note 9, at 5-11; US West Petition, supra note 9, at 37-40; Ameritech Petition, supra note 9, at 33-35; Reply Comments of SBC Communications Inc. in RM 9244, at 2-9 (filed May 4, 1998).

12/ Bell Atlantic Petition, supra note 9, at 10; Ameritech Petition, supra note 9, at 34 n.61.

13/ See, e.g., MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1994), aff'ing AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992); Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995); MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

14/ MCI Telecommunications Corp. v. FCC, 765 F.2d at 1194.

15/ Id. at 1194-1195 (distinguishing MCI from "cases in which Congress had supplied explicit deregulatory authority" for the elimination of tariffing requirements for certain airline, railroad, and trucking services). See also MCI Telecommunications Corp. v. AT&T Co., 512 U.S. at 234 (The Commission's desire to "increase competition" cannot provide it authority to alter the well-established statutory filed rate requirements; "such considerations address themselves to Congress, not to the courts") (quoting Maislin Indus., U.S., Inc. v.

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Section 706, of course, provides no specific authority to forbear from the statutory requirements of the Act. There was no reason for Congress to do so because it had already incorporated such authority into the statute -- in section 10. Available evidence indicates that the latter provision was intended to overturn the court decisions just discussed.[16/] Section 10 details the conditions under which the Commission may forbear, the criteria it must apply and, in some instances, the procedures it must follow. Basic principles of statutory construction mandate that the specific provisions of section 10 (including its limitation on forbearance from the requirements of sections 251(c) and 271) must supersede, or at least be read in conjunction with, the ambiguously general language of section 706.[17/]

The BOCs' construction of section 706 is also inconsistent with the goals of the Act. Sections 251 and 271 lie at the heart of the procompetitive structure that the statute creates. Congress understood that "central to competition to consumers . . . [was] opening the local telephone network to competition."[18/] The interconnection, unbundling, and resale provisions of section 251 were the congressionally-chosen means to achieve that end.[19/] Section 271, in turn, was

15/ (...continued from preceding page)
Primary Steel, Inc., 497 U.S. 116, 135 (1990) and Armour Packing Co. v. United States, 209 U.S. 56, 82 (1908)).

16/ See, e.g., S. Rep. No. 103-367, 103d Cong., 2d Sess. 117 (1994) (minority views of Senator Packwood and Senator McCain) (referring to section 230(g) of S. 1822, which set forth forbearance language materially similar to that appearing in section 10). The legislative history of the 1996 Act contains nothing about the origins of section 10.

17/ See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); United States v. LaPorta, 46 F.3d 152, 156 (2d Cir. 1994) ("[u]nder long-standing principles of statutory construction, a general section of a statute must give way to a specific one"); Bell v. Elmhurst Chicago Stone Co., 957 F. Supp. 1025, 1028 (N.D. Ill. 1997) ("if there are two potentially applicable provisions within a statute, one general and the other specific, the latter controls").

18/ 141 Cong. Rec. H8284 (daily ed. Aug. 2, 1995) (statement of Rep. Fields).

19/ Iowa Utils. Bd. v. FCC, 120 F.3d. 753, 816 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (1998) ("Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry").

intended not only to safeguard against the anticompetitive consequences that could arise if the BOCs failed to open their local markets prior to their provision of interLATA services, but also to encourage the companies to participate in the effort to introduce competition into those markets.[20/] Given Congress' expectation that competition would drive broadband deployment,[21/] it strains credulity to argue, as the BOCs do, that Congress would empower the Commission to promote such deployment by suspending prematurely the very provisions that were designed to make competition possible.[22/]

20/ See Office of Policy Analysis and Development, National Telecommunications and Information Administration, Section 271 of the Communications Act and the Promotion of Local Exchange Competition 55-56 and n.267 (NTIA Staff Working Paper Jan. 1998).

21/ See note 6 supra.

22/ US West claims that the language of section 251(c) "suggests" that the provision's interconnection and unbundling requirements "do not apply to the advanced data facilities and services described in this petition." US West Petition, supra note 9, at 44. That conclusion flows, in the company's view, from the statutory definitions of "local exchange carrier," "incumbent local exchange carrier," and "telephone exchange service." Id. at 45-46 n.24. Those definitions prove only that, in order to categorize service providers as "telecommunications carriers," LECs, and ILECs, Congress focused on some of the services each provider offers. The definitions say nothing about a firm's obligations under the Act, once it has been so categorized. That, of course, is the function of section 251.

Furthermore, neither that section nor its legislative history suggests that its requirements apply only to an ILECs' circuit-switched facilities and services. Indeed, the evidence is all to the contrary. See, e.g., 47 U.S.C. § 251(c)(3) (duty to provide unbundled network elements "to any requesting telecommunications carrier for the provision of a telecommunications service"), (c)(4)(A) (duty "to offer for resale any telecommunications service that the [ILEC] provides at retail"); 141 Cong. Rec. S8469 (daily ed. June 15, 1995) (statement of Sen. Pressler) (provisions of section 251 "permit regulatory flexibility and are not limited to a 'snapshot' of today's technologies or requirements").

Finally, if the ILECs' new data facilities were to become a new bottleneck, the Commission would be hard-pressed to reverse its position and to reimpose section 251(c) obligations on them. Because section 10 of the Act gives the Commission significant authority in appropriate circumstances to forbear from

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Forbearance Under Section 10 of the Communications Act

Any BOC request for relief from the statutory requirements of the Act in order to promote the deployment of DSL services must therefore be judged according to the standards of section 10, including subsection (d), which precludes the Commission from waiving the obligations imposed by sections 251(c) and 271 "until it determines that those requirements have been fully implemented." To date, the Commission has not determined that any BOC has fulfilled its section 271 obligations, particularly the requirement to comply fully with the competitive checklist. Consequently, section 10(d) precludes the Commission from waiving the requirements of section 271 for any BOC at this time.

As for section 251(c), the Commission should not deem that provision to be fully implemented, with respect to DSL services, until, at a minimum, ILECs give competitors access to two elements that are crucial to the development of alternative DSL services -- loop facilities capable of supporting DSL services and collocation space on ILEC premises.[23/] Available evidence indicates that

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22/ (...continued from preceding page)
applying any provision of the Act, see 47 U.S.C. § 160, the Commission should avoid a definitional approach. The Commission should therefore declare that the requirements of sections 251 and 271 apply to digital and broadband services and facilities. See Petition of the Association for Local Telecommunications Services for a Declaratory Ruling at 2-3, CC Docket No. 98-78 (filed May 27, 1998) (ALTS Petition).

23/ The Commission could reasonably choose to determine whether section 251(c) has been fully implemented on a service-by-service basis. The fundamental purpose of that provision is to ensure that new entrants can obtain from ILECs the facilities, functions, and capabilities that they need in order to provide competing local exchange services. See, e.g., S. Rep. No. 104-23, 104th Cong., 1st Sess. 19 (1995) (interconnection/unbundling provisions of S. 652 "provide[] a list of minimum standards relating to types of interconnection the local exchange carrier must agree to provide, if sought by the telecommunications carrier requesting interconnection") (emphasis added); 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) (1996 Act requires ILECs to "unbundle their networks and to resell to competitors the unbundled elements, features, functions, and capabilities that . . . new entrants need to compete in the local market"). If ILECs give competitors access to the network elements necessary to develop a competing DSL service, the goals of section 251(c) arguably have been achieved with respect to that one service. The Commission could then turn to the question
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competitors generally do not have such access today. Competitors complain, for example, that they cannot get DSL-compatible loops from ILECs on reasonable terms and on a timely basis.[24/] Even when competitors can obtain such facilities, existing collocation practices typically mean that they may offer broadband services only at a substantial cost disadvantage vis-a-vis the incumbent.

That disadvantage stems from the different way in which ILECs and their rivals provide DSL services. To offer such services, the ILEC need only add electronics to the DSL-compatible loops that they currently use to provide voice service to prospective DSL customers. The company typically must also install a relatively small rack of equipment in the central office that serves those customers. Finally, the ILEC must deploy network facilities to carry the subscriber's data traffic from the central office to other points, but it is free to use its central office to house and operate whatever switching or other equipment is required for that data network.

To provide a comparable service using ILEC facilities, a competitor must first negotiate an interconnection agreement with an ILEC in order to obtain DSL-

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23/ (...continued from preceding page)
of whether regulatory relief for the ILECs' DSL services would satisfy the standards set forth in section 10(a) of the Act. 47 U.S.C. § 160(a).

A Commission finding that section 251(c) has been sufficiently implemented to warrant forbearance from regulating an ILEC's DSL services would not reduce in any way the ILEC's obligation under that provision to provide, upon reasonable request, facilities, functions, and capabilities needed to develop and deploy other telecommunications services. Similarly, if an ILEC sought forbearance with respect to another of its services, section 10(d) would bar the Commission from acting until it determined that the ILEC was offering competitors all of the facilities, functions, and capabilities mandated by section 251(c) that competitors needed to offer a comparable service.

24/ See, e.g., Comments of COVAD Communications Co. in CC Docket No. 98-91, at 7-9 (filed June 24, 1998); Reply Comments of DSL Access Telecommunications Alliance in CC Docket Nos. 98-11, 98-26, 98-32, at 11 (filed May 6, 1998) (DATA Reply Comments); Comments of COVAD Communications Co. in CC Docket Nos. 98-11, 98-26, 98-32, at 8-9 (filed Apr. 6, 1998) (COVAD Bell Atlantic Comments). Competitors also allege that ILECs are refusing to interconnect their local data networks with those of competitors. See ALTS Petition, supra note 22, at 12-14; Consolidated Opposition of ACSI in CC Docket Nos. 98-11, 98-26, 98-32, at 6-7 (filed May 6, 1998).

compatible loop facilities and collocation space in each ILEC central office that serves the customers the competitor is targeting. Assuming that collocation space is available,[25/] the competitor generally must construct a fixed structure or "cage" to house its equipment. That process can take several months and can entail one-time capital costs in the range of $30,000-100,000.[26/] Moreover, the competitor is limited in the range of equipment that it may place and operate in the ILEC central office.[27/] In NTIA's view, the goals of section 251(c) have not been achieved, and its requirements have not been fully implemented, until competitors have a reasonable opportunity to market DSL services in competition with ILECs.

Preconditions for Commission Forbearance With Respect to ILEC DSL Services

NTIA believes that the Commission can give competitors reasonable and fair access to local loops without adopting significant additional regulations. The Commission has already obligated ILECs to provide competitors, on an unbundled basis, loop facilities "capable of providing services such as ISDN, ADSL, HDSL, and DS-1 level signals."[28/] It has made clear, moreover, that this requirement applies even in instances where an ILEC provides service using digital loop carrier

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25/ One prospective competitor alleges that in 15-20 percent of the offices in which it sought collocation, the ILEC claimed that no space was available. COVAD Bell Atlantic Comments, supra note 24, at 14. Moreover, the absence of collocation space for competitors in an ILEC office does not necessarily prevent the ILEC from installing its own DSL equipment in that office. Id. at 14-15 (citing instances in which Pacific Bell denied COVAD's collocation requests and then announced plans to offer DSL services out of the same offices).

26/ See, e.g., LCI International Telecom Corp, CLEC Access to xDSL Technology: A Necessary Predicate for Widespread, Competitive Deployment of Broadband Telecommunications Services 23 (June 1998); DATA Reply Comments, supra note 24, at 9.

27/ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15795, ¶ 581, recon., 11 FCC Rcd 13042, second recon., 11 FCC Rcd 19738 (1996), third recon., FCC 97-295 (rel. Aug. 18, 1997), further recon. pending, aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (1998) (No. 97-826 et al.) (competitors may not collocate switching equipment or equipment used to provide information services in an ILEC office).

28/ Local Competition Order, 11 FCC Rcd at 15691, ¶ 380.

(DLC) technology.[29] Finally, the Commission has mandated that if it is technically feasible for an ILEC to condition a loop to make it capable of transmitting digital signals (e.g., by removing bridge taps and loading coils), the ILEC must do so, so long as the requesting party pays the associated costs (which, in most cases, are non-recurring in nature).[30] The Commission need only reiterate those requirements and specify sanctions for non-compliance.

An ILEC could obviate arguments about any cost disadvantages to competitors by choosing to offer its DSL services through a separate unit.[31] If separation were done correctly, then the ILEC's DSL operations would be on a par with competitors. The DSL unit would have to negotiate an interconnection agreement in order to secure unbundled DSL-compatible loops and collocation space on the same terms and conditions as are made available to other DSL providers. The details of separation would be critical in determining whether the ILEC's DSL unit actually faces the same costs as competitors or whether the costs would be merely a fiction ignored by a common owner.

Scope of Forbearance Upon ILEC Compliance With Foregoing Preconditions

If the ILECs can demonstrate compliance with the requirements of section 251, as outlined above, the Commission should consider relaxing regulation of their DSL services, beginning with price regulation.[32] As many commenters have

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29/ Id. at 15692-15693, ¶¶ 383-384. Competitors can provide DSL services over DLC systems in at least two ways. First, they could be given access to any electronics that ILECs use to provide DSL-compatible loops over DLC facilities, including those located in DLC remote terminals. Alternatively, competitors (or ILECs at competitors' request) could replace DLC line cards in the remote terminals with DSL cards. If competitors opt for the second course, the Commission should ensure that they have maximum discretion to specify the DSL cards to be used, consistent with the need to safeguard the integrity of the ILECs' networks.

30/ Id. at 15692, ¶ 382.

31/ NTIA takes no position as to the precise degree of separation that would be appropriate. We do believe, however, that accounting safeguards or an imputation requirement would not be sufficient to address the many ways in which ILECs could discriminate against competing DSL service providers.

32/ We note that one oft-mentioned DSL configuration would give the subscriber a high-speed transmission path between the subscriber's premises and another designated point. In that application, DSL has been described as a virtual private

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pointed out, competition from other suppliers has prompted ILECs to accelerate their deployment of DSL and other broadband services.[33/] It is reasonable to assume that where such competition exists, market pressures will deter ILECs from charging excessive DSL rates.

The Commission should not, however, exempt ILECs from filing tariffs for their interstate DSL offerings. The tariff review process provides a useful mechanism for ensuring that those offerings do not receive underlying facilities, services, and functions on terms more favorable than those available to competitors. The Commission should require ILECs to file adequate cost support to demonstrate this result, while according otherwise streamlined treatment to those tariffs.

As for the unbundling requirements of section 251(c), Commissioner Ness recently noted that DSL equipment is readily available to ILECs and competitors alike.[34/] We further note that some equipment (most notably, the digital

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32/ (...continued from preceding page)
line. If that is true, its jurisdictional classification would depend on the nature of the traffic carried. If, for example, the DSL service gives the customer access to an Internet Service Provider (ISP), some companies have claimed that the traffic could be deemed predominantly interstate in nature. On the other hand, if DSL gives a telecommuter high-speed access to an employer's local access network (LAN) located within the same community, others claim that the traffic and the associated service will more likely be intrastate in nature. The Commission should gather a record to determine the specific DSL services, if any, that should be classified as interstate offerings.

NTIA understands that the central office equipment used to provide DSL service may soon include multiple routing capabilities -- to allow, for instance, a telecommuter to direct traffic either to the corporate LAN and to her chosen ISP. With the addition of such routing capabilities, DSL services would begin to look more like switched services, and the appropriate jurisdictional classification becomes more uncertain. The Commission should consider the implications of such a development in its forthcoming section 706 inquiry.

33/ See, e.g., ALTS Petition, supra note 22, at 9; Comments of the Competition Policy Institute in CC Docket Nos. 98-11, 98-26, 98-32, at 16 (filed Apr. 6, 1998).

34/ Remarks of Commissioner Susan Ness Before the Computer and Communications Industry Association's 1998 Washington Caucus at 7 (June 9,
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subscriber line access multiplexer (DSLAM)) does not appear to be characterized by such economies of scale as to prevent a competitor from deploying such equipment over a limited customer base. It may be the case that alternative DSL providers may not face a competitive disadvantage if this equipment were not available from the ILEC. If so, and assuming that section 251(c) has been fully implemented, as described above, it would not be unreasonable for the Commission to consider forbearance under section 10 with respect to the ILECs' obligation to provide access to DSL equipment on an unbundled basis.[35/] NTIA recommends that the Commission solicit further comment on this issue, including the costs and economies associated with DSL equipment, before making a final decision.

On the other hand, we do not believe that the Commission should at this time relieve ILECs of their duty under section 251(c)(4) to offer their interstate DSL services to competitors for resale at discounted rates. Resale of an incumbent's services has been one way for new entrants to develop their customer base. At the same time, a resale requirement should not unduly burden ILECs. Although they must offer their DSL services at reduced rates for resale, the discounts are pegged to the retail rates that ILECs, at least with respect to interstate services, will have broad discretion to set.

34/ (...continued from preceding page)
1998) (available at <http://www.fcc.gov/Speeches/Ness/spsn812.html>). Because the BOCs request forbearance from the unbundling requirement of section 251(c)(3) with respect to their DSL equipment, they tacitly admit that the Commission could reasonably determine, in accordance with the standards articulated in its Local Competition Order, that such equipment is a "network element." In the absence of Commission action, ILECs would have to afford competitors access to that equipment on an unbundled basis.

35/ The Commission should not forbear from applying the unbundling requirements to ILECs DSL services in any central office where an ILEC has not provided physical collocation to multiple competitors. Furthermore, where an ILEC offers loop facilities via DLC technology, the unbundling obligations should remain in place unless competitors can offer DSL services via those DLC facilities.

We emphasize, moreover, that forbearance would apply only to DSL equipment. ILECs would still be obligated to provide, upon request, other unbundled network elements to enable competitors to deploy services that route and transport DSL traffic from the ILEC central office to other points.

Longer-Term Issues To Be Addressed in the Commission's Section 706 Inquiry

NTIA recommends that the Commission's section 706 inquiry identify the regulatory changes necessary to bring about the deployment of broadband and other advanced telecommunications services to all Americans, while at the same time promoting competition and consumer choice. Toward that goal, we discuss below several initiatives that the Commission should include in its forthcoming section 706 inquiry.

Collocation Issues

NTIA recommends that the Commission consider modifications to its collocation policies to advance further the competitive goals of the 1996 Act. Specifically, the Commission should examine modifications to its collocation rules that could induce ILECs to reduce collocation costs for all providers. In its rulemaking implementing section 251 of the Act, the Commission solicited comment on the wisdom of its adopting certain minimum requirements concerning the duties that provision imposed. In response, NTIA expressed reservations about such an approach.[36/] Our concerns have not lessened with the passage of time.

In the wake of the Commission's decision blessing collocation cages as a response to ILECs' security concerns,[37/] cages (and the costs and delays they entail for competitors) are now the standard collocation arrangement.[38/] Similarly, after the Commission approved 100 square feet as a reasonable minimum size for a collocation cage, ILECs commonly decline to agree to anything less.[39/] As a

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36/ Reply Comments of the National Telecommunications and Information Administration in CC Docket No. 96-98, at 8 (filed May 30, 1996) (NTIA Reply Comments).

37/ Local Competition Order, 11 FCC Rcd at 15803, ¶ 598.

38/ Although US West has apparently agreed to offer "cageless" collocation in at least one State (Washington), other ILECs have yet to follow suit. SBC, for example, cites the Commission's rule as support for its decision not to permit cageless collocation. See, e.g., Consolidated Reply Comments of SBC Communications Inc. in CC Docket Nos. 98-11, 98-26, and 98-32, at 10-11 (filed May 6, 1998).

39/ And, of course, the larger the minimum space requirement, the greater the likelihood that a ILEC central office will lack sufficient space to accommodate requesting parties.

result, competitors frequently are compelled to pay for floor space in excess of that needed to house their equipment.

The Commission could ameliorate this situation by replacing its fixed collocation requirements with the more dynamic approach outlined in the NTIA Reply Comments. Specifically, if (1) a State commission has ordered a ILEC to provide a particular collocation arrangement or (2) an ILEC has voluntarily offered to provide such an arrangement, there would be a rebuttable presumption that it would be technically feasible for ILECs in any other part of the country to make available the same arrangement.[40/] While this would not solve all collocation disputes, it would provide a mechanism by which procompetitive decisions in some States could be diffused throughout the country without the need for continual Commission intervention. It would also reduce the number of instances in which ILECs can invoke Federal regulations to avoid more expansive collocation practices.

Consistent with the procompetitive thrust of the 1996 Act, NTIA also believes the Commission should consider how modifications to its collocation rules can further promote conditions of parity among competitors. In its Local Competition Order, the Commission allowed competitors to collocate equipment used for interconnection or access to unbundled elements. The Commission specifically declined to permit competitors to collocate switching equipment capable of performing other functions as well.[41/] That ruling was curious in several respects. The Commission readily conceded, for instance, that the limitation would be difficult to implement "because modern technology has tended to blur the line between switching equipment [which may not be collocated] and multiplexing equipment, which we permit to be collocated."[42/] The Commission is certainly correct that the trend in manufacturing is to integrate multiple functions into telecommunications equipment. That development has benefited service providers and their customers by reducing cost, promoting efficient network design, and expanding the range of possible service offerings. The Commission's ban on collocation of switching equipment could inadvertently arrest that development by making competitive providers wary of purchasing multifunction equipment for fear that they would not be able install such devices in their

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40/ NTIA Reply Comments, supra note 36, at 11. An ILEC opposing such an arrangement would have the burden of persuading the relevant State commission by clear and convincing evidence that the collocation requested is not technically feasible. Id.

41/ Local Competition Order, 11 FCC Rcd 15795, ¶ 581.

42/ Id.

collocated space. The prohibition could also disadvantage competitive providers of advanced digital services because it does not apply to ILECs.

The Commission apparently barred collocation of switching equipment because it is not "necessary" or "used for the actual interconnection or access to unbundled network elements."[43/] There is nothing in section 251, however, to suggest a Congressional intention to limit the type of equipment that competitors may install in ILEC offices. Indeed, in view of the fact that Congress specifically entitled competitors to secure unbundled elements from ILECs in order to provide any "telecommunications services," it would be illogical to conclude that Congress then restricted competitors' discretion to select the equipment that they would use to convert those elements into marketable services.[44/]

The evidence indicates that section 251(c)(6) -- which states the ILECs' collocation obligations -- was included in the 1996 Act for one reason: to reverse a court ruling that the Commission lacks authority to order physical collocation in the absence of specific congressional authorization.[45/] Having done so, Congress identified only two limitations on competitors' collocation rights. The first concerns the entities that could request collocation -- telecommunications service providers only.[46/] The second relates to the purposes for which collocation can be requested -- interconnection and access to unbundled network elements.[47/] But the fact that Congress saw fit to restrict the class of firms that could seek

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43/ Id. See also 47 U.S.C. § 251(c)(6) (creating a duty on the part of ILECs "to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the [ILEC]").

44/ See 47 U.S.C. § 251(c)(3). The Act permits competitors to interconnect with an ILEC's network "for the transmission and routing of telephone exchange service and exchange access." Id. § 251(c)(2)(A). The specific linkage of interconnection and routing of traffic suggests strongly a Congressional understanding that competitors may wish to collocate switching equipment in ILEC central offices in order to effectuate the competitors' interconnection rights.

45/ See H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 73 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 39 (House Report). The court decision was Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

46/ See House Report, supra note 45, at 73, 1996 U.S.C.C.A.N. at 39.

47/ 47 U.S.C. § 251(c)(6).

collocation and the purposes for which they could do so does not imply an intent to limit the types of equipment that could be used.

NTIA therefore recommends that the Commission reconsider its ban on the collocation of switching equipment. If the Commission is concerned that a reversal of the current policy may prompt excessive demands from competitors for ILEC central office space, the better approach would be to address the problem directly, rather than by adopting unnecessary and potentially unsustainable distinctions based on the functionalities that a piece of equipment can perform.[48/]

Streamlined Certification of Interstate Carriers

NTIA also believes that the Commission's section 706 inquiry should examine impediments that Internet service providers (ISPs) face in offering their customers high speed local access to their Internet gateways. Because section 251 obliges ILECs to provide interconnection, unbundled network elements, and resale only to telecommunications carriers, its protections are not available to ISPs. This gap in the law, among other things, has allegedly hampered the ability of ISPs to develop such offerings.[49/] The Commission has suggested that ISPs can overcome that handicap by becoming carriers themselves or by partnering with or obtaining high speed access services from competitive telecommunications providers.[50/] ISPs respond that teaming with a competitive provider is not a viable option, even assuming that one operates in an ISP's market, because "[p]lacing a middleman between the customer and the [ISP] does not further [the] goal" of providing "a high-quality data pipe to the customer at the lowest reasonable cost."[51/]

ISPs further note that becoming a carrier typically implies State certification which, in turn, may entail lengthy applications, preparation of proposed tariffs, tests of financial fitness, and other requirements that can test the resources of a

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48/ There is no evidence that the routing equipment used in data service applications will cause space problems.

49/ See, e.g., Comments of Helicon Online, L.P. in CC Docket No. 95-20, at 2-3 (filed Mar. 27, 1998) (Helicon Comments).

50/ See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6091, ¶ 95 (1998).

51/ Helicon Comments, supra note 49, at 4.

small ISP.[52] One might reasonably argue that an ISP seeking to provide interstate high-speed Internet access as a carrier can be certificated as an interstate carrier. As noted above, to the extent that such access services give customers a direct connection to an ISP for the carriage of Internet traffic, those services could be considered interstate services.[53] Prospective carriers planning to offer such services could thus request authorization from the Commission. NTIA recommends that the Commission use its section 706 inquiry to identify the obstacles faced by ISPs in deploying services, to evaluate their authority to create a streamlined certification process for ISP carriers, and to consider forbearing from regulating them.[54]

Adopting Broader Interconnection Policies to Promote Greater Customer Choice for Advanced Services

NTIA understands that the petitioning BOCs are developing DSL services in large part to give customers continuous ("always on"), high speed connections to their workplaces and to the Internet. Those services appear to have two separate components. The DSL service (which is marketed to residential and business customers) carries data traffic from the customer's premises to the telephone company's central office. The second piece is a local data transport service (such as a frame relay or cell relay service), which is marketed to ISPs and others (including the BOCs' own ISP operations) and which carries traffic from the central office to, for example, an ISP. A carrier would create an Internet access service by "joining" the component services together, thereby allowing DSL customers of a particular carrier to reach those ISPs (and only those ISPs) that have subscribed to local data transport services from that same carrier. In other words, both the DSL subscriber and the ISP would have to be customers of the same carrier.[55] The BOCs suggest that they will actively market such data services to all ISPs, so as to give DSL subscribers a variety of ISPs from which to choose.

52/ See, e.g., Joint Comments of Retail Internet Service Providers in CC Docket No. 95-20, at 9-10 (filed Mar. 27, 1998).

53/ See supra note 32.

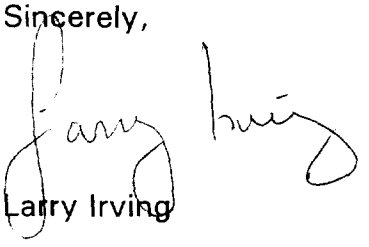
54/ We would also encourage State commissions to consider streamlined certification procedures for new carriers seeking to offer services subject to State jurisdiction.

55/ Under such an arrangement, if a market has more than one DSL carrier, an ISP targeting all DSL subscribers in that market would likely have to become customers of every DSL carrier serving that market.

The Commission's section 706 inquiry should examine ways to promote greater customer choice for advanced services. NTIA applauds the industry's efforts to develop and to deploy improved Internet and other access services. As these developments go forward, however, the Commission and the industry should consider further action to promote competition and to make a new generation of advanced services even more attractive to consumers. One approach that merits the Commission's attention would be to examine the feasibility and desirability of creating rules that would allow carriers with DSL customers to interconnect with different carriers that provide local data transport services to ISP customers.[56/] Such rules could ensure that a subscriber's choice of DSL provider would not limit its choice of ISPs. They would also eliminate the need for an ISP targeting a particular geographic market to become a customer of every DSL carrier in that market. Instead, the ISP could make its best deal for local transport services and be assured of reaching all potential subscribers in a local market via interconnection with all DSL service providers in that market. In this way, expanded interconnection rules could make a new generation of advanced services more attractive by increasing customers' choices of both ISPs and loop access service providers. Those rules would simplify the process of making such choices and would increase competition among carriers for DSL subscribers and ISP customers.

Thank you for your consideration of these views.

Sincerely,



Larry Irving

cc: Commissioner Harold Furchgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Kathryn C. Brown, Chief, Common Carrier Bureau

56/ See Remarks by Chairman William Kennard to the Federal Communications Bar Association at 5 (June 24, 1998), (available at <http://www.fcc.gov/Speeches/Kennard/ spwek819.html>).